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IN THE

# Supreme Court of the United States

October Term, 1968
No. 562

RALPH RICHARD BENSON,

*Petitioner,*

*vs.*

LELAND C. CARTER, PROBATION OFFICER OF LOS ANGELES COUNTY, PEOPLE OF THE STATE OF CALIFORNIA,

*Respondents.*

## Brief for Respondent, People of the State of California, in Opposition.

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*Respondents.*

## Brief for Respondent, People of the State of California, in Opposition.

### Opinions of the Courts Below.

The opinions previously rendered in this case are as noted in the present petition for writ of certiorari.

### Jurisdiction.

The jurisdiction of this Court which petitioner presently invokes, as well as his prior attempts to invoke the jurisdiction of this Court, are as noted in the present petition for certiorari.

### Questions Presented.

Contrary to the petition in this case, the respondent, State of California, believes that the following issues are properly presented by this case and that the issues

posed by this case are not as limited as petitioner might have this court believe:

1. Can petitioner raise the issue of entrapment when he never raised this issue in the trial court?

2. Can petitioner raise the issue of entrapment where the trial record does not support any claim that the trier of fact, a trial judge, refused to consider the issue of entrapment?

3. Can petitioner attempt to litigate the issue of entrapment where the evidence presented at his trial, as a matter of law, does not support this defense?

4. Only if each of the above issues is decided in petitioner's favor, can petitioner raise the next question: Is entrapment a constitutionally protected defense?

5. If entrapment is deemed to be a constitutionally protected defense, the next question posed by this case is as follows: Does a rule that a defendant who denies that the act charged as a crime was committed cannot rely upon the defense of entrapment violate due process?

6. If this Court, after deciding all the above issues in petitioner's favor, promulgates a rule declaring entrapment a constitutionally protected defense which can be asserted while at the same time denying the crime, then it must decide whether this newly announced rule shall be given retroactive application in a collateral attack such as is presently made by petitioner.

## Statement of the Case and of Facts.

Although the People are not in agreement with appellant's abbreviated statement of facts relating to the conviction underlying this petition for writ of certiorari, we shall not further encumber the files of this Court as to the actual facts underlying this conviction by setting them forth herein. Instead, we refer this Court for an adequate summary of the facts to the prior reported decisions of this case which are reported in 396 F. 2d 319 (9th Cir. 1968), 336 F. 2d 791 (9th Cir. 1964) and 206 Cal. App. 2d 519, 23 Cal. Rptr. 908 (1962) and to the brief of the People which was filed with the California Court of Appeal and was forwarded to the Court of Appeals for the Ninth Circuit as part of the Transcript of Record (designated as Exhibit E in the Transcript of Record) and which is therefore part of the record in this case.[1]

However, it should be noted in passing that the Transcript of Record before the Court of Appeal in this case and the record which can therefore be considered by this Court at the present time (Rule 21, paragraph 1 of the Rules of this Court), is identical in all material respects

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[1]Counsel for the People has made inquiry of the office of the Clerk of this Court, the Clerk of the Court of Appeals for the Ninth Circuit, and the office of the Clerk for the Federal District Court in which the present habeas corpus proceedings were initiated. Based on this inquiry, it appears that the two-volume Transcript of Record was forwarded to this Court by the Clerk of the Ninth Circuit and that those documents which are set forth on page 2 of the index of that Transcript of Record were returned by the Clerk of the Ninth Circuit to the Federal District Court, even though they had been before the Court of Appeal during the pendency of this case before that court. Accordingly, the office of the Clerk of the Federal District Court has been requested to forward those documents specified on page 2 of the index to this Court, and it is the understanding of counsel that this has been done.

to the record reviewed by this Court in each of the three prior petitions for certiorari sought by the petitioner. Thus, the instant case was submitted to the Federal District Court pursuant to the same record which has been reviewed in each of petitioner's prior appeals to this Court.

The only change that has occurred between petitioner's prior attempts to obtain appellate review from this Court and the present petition for certiorari is that the California Supreme Court decided *People v. Perez,* 62 Cal. 2d 769, 44 Cal. Rptr. 326, 401 F. 2d 934 (1965). Prior to the decision in that case, a number of California appellate decisions had held that a defendant who denied the crime could not at the same time raise the defense of entrapment.[2] In *People v. Perez,* the California Supreme Court changed this rule of law and disallowed "statements to the contrary" which had appeared in a number of California cases, including *People v. Benson,* 206 Cal. App. 2d 519, 532, 23 Cal. Rptr. 908 (1962). As noted in the opinion of the Ninth Circuit from which petitioner now seeks certiorari, the decision in *People v. Perez* was rendered pursuant to the supervisory power of a court to regulate the conduct of a criminal trial. 396 F. 2d at 322.

[2]It should be noted, however, that there was California authority holding that entrapment could be asserted at the same time as a person denied the crime. (See *People v. West,* 139 Cal. App. 2d Supp. 923 [1956].)

## ARGUMENT.

### I.

### Petitioner Never Raised the Issue of Entrapment in the Trial Court.

The United States Court of Appeals for the Ninth Circuit, after reviewing the reporter's transcripts of the proceedings held at petitioner's trial,[3] concluded that petitioner had never raised the issue of entrapment in the trial court. (See 296 F. 2d at 321 and 336 F. 2d at 797, n. 3.) It is our contention that, having failed to raise the issue in the trial court, petitioner is precluded from raising the issue of entrapment in this court.

### II.

### There Is No Evidence That the Trial Court Failed to Consider the Issue of Entrapment.

Even if it be assumed that petitioner properly raised the issue of entrapment in the trial court, there is no evidence that the trial judge failed to consider this evidence. As noted above, prior to the decision in *People v. Perez,* although there were a number of appellate decisions holding that where a defendant denied the crime he was precluded from raising the entrapment issue, there was California authority to the contrary. (See footnote 1, *supra.*) Petitioner, in his petition for writ of certiorari, states that at his trial no instruction on entrapment was given. (See p. 5 of the petition.) This is true because petitioner did not have a jury trial, and accordingly no instructions need be given, since the

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[3]These transcripts are designated as "Four volumes reporter's transcript proceedings from Superior Court of Los Angeles, County, [Exhibit A to A-3]" in the Transcript of Record.

judge presumably would not have to instruct himself as to what the law is. Petitioner on the record of this case cannot show that the judge failed to consider the issue of entrapment. Indeed, petitioner's claim that no instructions were made on entrapment is also answered by noting that the record in this case fails to disclose any request by petitioner for such instruction or for such consideration by the trial judge of this defense.

## III.

## The Evidence in This Case Does Not Support the Defense of Entrapment.

After the holding relating to entrapment in *People v. Perez,* California appellate courts were faced with the question of whether that holding should be applied to cases then pending on appeal wherein the defendant had not raised the issue of entrapment in the trial court, but had presented evidence which would have supported a justiciable issue relating to entrapment. In two appellate cases it was held that the defendant was entitled to a reversal of his conviction because of the failure of the trier of fact to consider this defense. (See *People v. Marsden,* 234 Cal. App. 2d 796, 44 Cal. Rptr. 728 [1965] and *People v. Monteverde,* 236 Cal. App. 2d 630, 46 Cal. Rptr. 206 [1965].) It should be noted, however, that in both of these cases the appellate court held that the defendant had presented evidence upon which to litigate the issue of entrapment. In another appellate decision the California Court of Appeal held that this right to have the trier of fact consider the defense in cases then on appeal was dependent upon the presentation of evidence of entrapment in the trial court (see *People v. Bourland,* 247 Cal. App. 2d 76, 93-94 [1966]).

In the present case, however, the evidence presented at the trial of petitioner was not sufficient as a matter of law to support the defense of entrapment and it was so held by the California Court of Appeal in its review of petitioner's conviction. In its opinion, that court stated as follows:

> "Under the circumstances, we need not discuss the additional claims (*although neither is tenable*) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law." (206 Cal. App. 2d at 532; emphasis added to language appearing in parentheses.)

It is thus clear from this sentence that the California Court of Appeal, in addition to holding that the defense of entrapment could not be relied upon by petitioner because of his denial of the crime, also concluded that it was not tenable because the facts did not support reliance upon this defense. A detailed discussion of this aspect of the case appears at pages 60-63 of the Respondent's Brief filed with the California Court of Appeal which was designated Exhibit E in the Transcript of Record in the Court of Appeals for the Ninth Circuit.

## IV.

## The Defense of Entrapment Is Not a Constitutionally Protected Defense.

It appears that the defense of entrapment is an American innovation unknown at common law in England and is a defense which came into being in the late 19th century, long after the adoption of the Federal Constitution. See William E. Mikell, *The Doctrine of Entrapment in the Federal Courts,* 90 U. Pa. L. R. 245-247.

The principles of entrapment were created by the courts of the various states and the federal courts not because of any constitutional compulsion, but rather as a judicial or statutory principle which those courts believed should be applicable in the trial of criminal cases.[4] Thus, this Court accepted the doctrine of entrapment as being based upon a state of facts which either the legislature had not intended to cover (see majority opinion in *Sorrells v. United States,* 287 U.S. 435 [1932]) or which the courts, in order to protect the purity of government and its processes, would not permit to be used as the basis for a conviction (see concurring opinion in *Sorrells v. United States, ibid.* at 453). Neither the majority nor the concurring opinion in the *Sorrells* case premise their analysis on a constitutional basis. No subsequent decision of this Court has ever held that entrapment is a constitutionally protected defense.

Turning to the federal courts of appeal, it appears that in the only two reported decisions which have ever considered the question of whether entrapment is a constitutionally protected defense, this contention has been rejected. (See *Hall v. Illinois,* 329 F. 2d 354 [7th Cir. 1964], and *Benson v. California,* 336 F. 2d 791, 797-798 [9th Cir. 1964], as explained in *Benson v. Carter,* 396 F. 2d 319, 322, n. 2 and the accompanying text [9th Cir. 1968].) To our knowledge, there is no case that has ever declared the defense of entrapment as being automatically relegated into a constitutionally protected defense.

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[4]However, Tennessee has rejected entrapment as a defense. *Williams v. State,* 218 Tenn. 359, 403 S.W. 2d 319 (1966).

## V.

## The Rule That a Defendant Who Denies That the Act Charged as a Crime Was Committed Cannot Rely Upon the Defense of Entrapment Does Not Violate Due Process.

As noted in the opinion of the Ninth Circuit in the instant case, the rule in that circuit is presently in accord with the rule which prevailed in California prior to *People v. Perez* (see 396 F. 2d at 322). This is in accord with the majority rule in the United States. (See the annotation appearing in 61 A.L.R. 2d 677 which contains a multitude of federal and state cases which stand for the proposition that the defense of entrapment is not available to one who denies that he committed the offense charged.)

We submit that in light of the majority rule noted above, it cannot be said that due process of law, as that term is used in the Fourteenth Amendment, includes, as one of its fundamental aspects, the right to claim entrapment when one at the same time denies commission of the act charged. Recently this Court reinterpreted the concept of what is to be deemed "fundamental" to due process. See *Duncan v. Louisiana,* 391 U.S. 145, 148-149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968). In that case it was held that one of the crucial, if not all-pervading, indicia of whether a certain procedure is fundamental would be a consideration of whether such procedure "is fundamental in the courts of the criminal process maintained by the American States." (391 U.S. at 149-150, n. 14, 88 S. Ct. at 1448, 20 L. Ed. 2d at 496-497.) As contrasted to the right to jury trial under consideration in *Duncan*, where no American state had established a system without the

right to jury trial, many states, as well as many federal circuits, have adopted the rule which prevailed in California prior to *People v. Perez*. Accordingly, we contend that no denial of a fundamental right protected by the federal constitution occurred in the present case.

## VI.

## Any New Rule as to the Constitutional Status of Entrapment Should Not Be Applied Retroactively.

As noted previously in this brief, the record upon which petitioner seeks to overturn his conviction is identical to that previously considered by this Court on three prior occasions. Petitioner seeks to collaterally attack the validity of his conviction. We would urge that the reasons which have previously caused this Court to conclude that certain of its newly announced rules should not be retroactively applied are also applicable to this case, and that if there is to be a new rule as to entrapment, it should be applied to a case directly on appeal to this Court and not to one arising out of a federal habeas corpus proceeding.

As noted above, the defense of entrapment has never been declared constitutionally protected and the rule which petitioner attacks, namely, that a defendant who denies the offense with which he is charged cannot at the same time claim entrapment, has been announced and followed in numerous federal and state jurisdictions. These jurisdictions, we submit, have reasonably relied upon this rule, and in the present case this is obviously so. In this case the petitioner sought to litigate this same issue before this Court on three prior occasions and each time he has been refused a hearing. In the

meantime the evidence against petitioner has grown stale, and we submit that it would be improper to now apply a new rule of law to a case wherein the state believed that it had properly convicted the petitioner and the reasonableness of such belief was fostered by this Court's refusal to consider this same issue on this same record on three prior occasions. The State of California relied upon what this Court decided in *Sorrells v. United States, supra,* wherein this Court adopted the doctrine of entrapment on a nonconstitutional basis. In the years since *Sorrells,* this Court has made no change, and the federal Courts of Appeal have applied a similar non-constitutional rule, giving further justifiable reliance on the part of the states that such a defense was not constitutionally compelled. As in *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965): (1) there is a prior decision of this Court upon which the states rely, (2) the purpose to be served by accepting the doctrine of entrapment is similar to that sought to be achieved in adopting the rule against illegal searches and seizures, namely to deter illegal police action;[5] and (3) to give this rule retroactive application "would tax the administration of justice to the utmost." (381 U.S. at 637, 85 S. Ct. at 1742, 14 L. Ed. 2d at 613.)

Petitioner's conviction has long ago become final. We urge that its finality should be upheld.

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[5]It should be noted that in setting forth the policy reasons underlying the doctrine of entrapment, the California Supreme Court stated that it was recognizing this defense "for reasons substantially similar to those which caused this court . . . to adopt the rule that evidence obtained in violation of constitutional guarantees is not admissible; . . . the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime." (*People v. Benford,* 53 Cal.2d 1, 9 [1959].)

## Conclusion.

Petitioner attempts to create substantial federal questions without any evidence or law to support his contentions. Petitioner's petition for certiorari should be denied.

Respectfully submitted,

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